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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 272.

WILLIAM H. ROBERTSON, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

BERNARD J. SALOMON AND SAMUEL MENDEL PHILLIPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 20, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 272.

WILLIAM H. ROBERTSON, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

BERNARD J. SALOMON AND SAMUEL MENDEL PHILLIPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Bernard J. Salomon and Samuel Mendel Phillips, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened to the great damage of the said William H. Robertson, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fourth Monday of October, eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness Hon. Samuel F. Miller, senior associate justice of the said Supreme Court, the 5th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to twenty-seven, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William H. Robertson, plaintiff in error, against Bernard J. Salomon and Samuel Mendel Phillips, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 18th day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed:) 9417. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Bernard J. Salomon & ano., defendants in error. Writ of error. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within writ of error is hereby admitted this 6 day of Oct, 1888. Charles Curie, attorney for defendants in error.

(Stamp:) U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

3 Superior court of the city of New York.

BERNARD J. SALOMON, SAMUEL MENDAL Phillips, plaintiffs,
against
WILLIAM H. ROBERTSON, DEFENDANT.

Summons No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Oct. 15, 1884.

CHAS. CURIE,
Plaintiffs' Attorney (Office, No. 44 Exchange Place, New York City).

(Endorsed:) No. 1, N. Y. superior court. Bernard J. Salomon, Samuel Mendal Phillips, plaintiffs, against William H. Robertson, defendant. Summons. Chas. Curie, plaintiffs' attorney, 44 Exchange Place, New York City. Due service hereof admitted, Oct. 15, '84.

4 N. Y. superior court.

BERNARD J. SALOMON & AL.
versus
WILLIAM H. ROBERTSON.

Notice of appearance and demand.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a bill of particulars of the plaintiffs' claim herein, and a copy of the complaint and all papers in this action upon me, at my office in the United States court and post-office building, in the city of New York.

Yours,

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

New York, Oct. 22, 1884.

To CHAS. CURIE, Esq.,
Attorney for Plaintiff.

(Endorsed:) 9417. N. Y. superior court. Bernard J. Salomon & al. versus William H. Robertson. N. 1. Notice of appearance. Elihu Root, United States attorney, attorney for defendant. To Chas. Curie, esq., plaintiffs' attorney. Oct. 22, '84.

5 The President of the United States of America. To the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against William H. Robertson, defendant, by Bernard J. Salomon & ano., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 28 day of Oct., 1884, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 5th day of Nov., in the year one thousand eight hundred and eighty-four.

[L. S.] TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

6 (Indorsed:) 9417. U. S. circuit court. Bernard J. Salomon & al. vs. William H. Robertson, copy certiorari. Elihu Root, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Oct. 28, 1884. Yours, Elihu Root, U. S. attorney, attorney for defendant, to Charles Curie, plaintiffs' attorney.

7 Circuit court of the United States for the southern district of New York.

BERNARD J. SALOMON, SAMUEL MENDEL Phillips, plaintiffs,
against
WILLIAM H. ROBERTSON, DEFENDANT.

Complaint.

Plaintiffs complain:

1st. That defendant was, during the time hereinafter named, collector of customs of the United States at the port of New York.

2nd. That plaintiffs were, during said times, partners in trade, under the firm name of Salomon & Phillips, and, as such, duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintifis, as and for duties thereon, and plaintiffs, in order to obtain said goods, were compelled to pay and did pay, the sum of two hundred & eighty-eight $\frac{29}{100}$ dollars in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals in each case to
8 the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals, when this action was commenced.

6th. That the bill of particulars, hereto annexed, states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore, plaintiffs demand judgment against defendant for two hundred & eighty-eight $\frac{20}{100}$ dollars, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiffs.

(Endorsed) 9417. U. S. circuit court. Bernard J. Salomon & al., plaintiffs, against William H. Robertson, defendant. Complaint. Chas. Curie, plaintiffs' attorney, 44 Exchange Place, New York City. Due service of a copy hereto admitted this 10 day of Nov., 1884. Elihu Root, U. S. attorney, atty. for deft.

9 *Bill of particulars.*

Name of importer: Salomon & Phillips.

Description of goods.	Whence imported.	Name of vessel.
For coverings, putting up & packing, charges on leather & other mdse.	L'pool	Bothnia
Upper-leather findings	Hamburg	Rugia
Upper-leather findings	Hamburg	Rhætia
Fabrics in part India rubber	L'pool	Baltic
For coverings, putting up & packing, charges on fabrics in part India rubber & other mdse.	L'pool	Baltic
Fabrics in pt. India rubber	L'pool	Bothnia

Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
May 10, 1883	May 24, 1883	1.05	May 24, 1883	July 5, 1883	July 5, 1883	No ans. rec'd.
Jan. 29, 1884	Feb'y 13, 1884	70.00	Mch. 31, 1884	Mch. 27, 1884	Mch. 27, 1884	Oct. 3.
Mch. 4, 1884	Mch. 22, 1884	77.50	Apl. 1, 1884	Apl. 9, 1884	Apl. 9, 1884	" 3.
Feb'y 6, 1884	" 5, 1884	26.35	Mch. 6, 1884	" 25, 1884	" 25, 1884	July 21, 1884.
Feb. 8, 1884	Mch. 6, 1884	3.50	Mch. 6, 1884	Apl. 25, 1884	Apl. 25, 1884	No ans. rec'd.
May 20, 1884	June 4, 1884	109.80	June 4, 1884	June 28, 1884	June 28, 1884	Oct. 3, '84.

10 (Indorsed:) 9417 U. S. circuit court, southern district of New York, Bernard J. Salomon against Wm. H. Robertson. Bill of particulars. New York, —— 188—, to Stephen A. Walker, esquire, defendant's attorney.

SIR: Please to take notice, that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Chas. Curie, aintiff's attorney, 44 Exchange Place, New York City.

11 Circuit court of the United States for the southern district of New York.

BERNARD J. SALOMON & AL.
versus
WILLIAM H. ROBERTSON, COLLECTOR, etc.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing to the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

12 V. And further answering, defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by defendant, in his official capacity aforesaid, to the United States, and placed beyond his control.

VI. And further answering, defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were sums due from plaintiffs to the United States as duties, according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
U. S. Att'y, Att'y for Def't.

13 (Endorsed:) 9417. Copy. U.S. circuit court southern district of New York. Bernard J. Salomon & al. vs. William H. Robertson, collector, etc. Answer. Stephen A. Walker, U.S. att'y, att'y for def't. Due service of a copy of the within answer is hereby admitted. New York, May 11, 1886.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Tuesday, the 24 day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The honorable E. Henry Lacombe, circuit judge.

BERNARD J. SALOMON ET AL.
vs.
WILLIAM H. ROBERTSON. } 9417.

Now come the plaintiffs, by Stanley, Clarke & Smith, their attorneys, and move the trial of this cause; also comes the defendant, by Magrane Coxe, esq., Asst. U. S. atty, his attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties & the argument of counsel the court directs the jury to find a verdict for the plaintiffs on Exhibits No. 3 for $26.35 and interest, and on Exhibit No. 4 for the amount claimed, amounting in all to the sum of $157.08. For which sum the jury found a verdict for the plaintiffs. Counsel for the respective parties sum up to the jury. The court charges the jury, who retire in charge of an officer duly qualified, and on their return say that they have agreed upon a verdict for the defendant on Exhibits Nos. 5 & 6. Verdict for defendant upon said last-mentioned exhibits.

It is ordered that plaintiffs have a stay of proceedings on said verdict for thirty days in which to prepare and serve a case, with leave to turn the same into a bill of exceptions.

[L. S.] TIMOTHY GRIFFITH, *Clerk.*

(Extract of minutes.)

15 U. S. circuit court, southern district of New York.

BERNARD J. SALOMON ET AL.
vs.
WILLIAM H. ROBERTSON.

Judgment.

This case having been brought on for trial on the 24th day of January, 1888, before the Hon. E. Henry Lacombe, judge of this court, and a jury, and a verdict having been rendered by the jury under direction of the court for the plaintiffs for the sum of one hundred and fifty-seven dollars and eight cents ($157.08),

Now, on motion of Charles Curie, esq., attorney for the plaintiffs,

It is adjudged that the plaintiffs, Bernard J. Salomon and Samuel Mendal Phillips, have judgment against the defendant, William H. Robertson, for the sum of one hundred and fifty-seven dollars and eight cents ($157.08) damages, forty-six dollars and eighty-five cents ($46.85) costs, six dollars and sixty-seven cents ($6.67) interest, making in all the sum of two hundred and ten dollars and sixty cents ($210.60), and have execution therefor. N. Y., October 5th, 1888.

Judgment signed this 5th day of October, 1888.

JOHN A. SHIELDS, *Clerk.*

16 (Endorsed:) No. 9417. U. S. circuit court, southern district of New York. Bernard J. Salomon et al. vs. William H. Robertson. Judgment roll. Charles Curie, attorney for plaintiff, 44 Exchange place, N. Y. City. U. S. circuit court. Filed Oct. 5, 1888, 3 p. m. John A. A. Shields, clerk.

17 United States circuit court, southern district of New York.

BERNARD J. SALOMON AND OTHERS, plaintiffs, *vs.* WILLIAM H. ROBERTSON, DEFENDANT. } N. S. 9417.

Defendant's bill of exceptions.

And afterwards, to wit, on the 23rd and 24th days of January, 1888, this cause came on to be tried before Hon. E. Henry Lacombe, circuit judge, and a jury, duly impaneled and sworn to try the issues herein.

The parties above named appeared by counsel respectively; the plaintiffs by Stephen G. Clarke and Charles Curie, esqs., and the defendant by Stephen A. Walker, esq., U. S. attorney, and Macgrane Coxe, esq., asst. U. S. attorney, and during the course of the trial and before the rendering of a verdict, the following proceedings among others were had:

To sustain the issues upon their part, the plaintiffs adduced evidence tending to prove that in the months of March and June, 1884, they imported into the port of New York from England certain merchandise invoiced as elastic webbings. That some of this merchandise was composed of worsted and India rubber, and the remain-

18 der of cotton, silk, and India rubber. That defendant, as collector of customs at said port, levied duties on said merchandise made of worsted and rubber at the rate of 30 cents per pound and 50% ad valorem, and on that composed of cotton, silk, and rubber, at the rate of 35% ad valorem, which sums so exacted as duties respectively the plaintiffs paid under protest, stating the grounds of their dissatisfaction with such ascertainment and levy of duties substantially as follows: "That under existing laws, and particularly by Schedule N of the tariff act of March 3, 1883, said goods were liable at no more than 30% ad valorem as fabrics in part India rubber not otherwise specially enumerated or provided for;" and that said duties so claimed to have been levied and paid in excess of the lawful rate amounted, with interest from the respective dates of payment, in the case of the worsted and rubber goods, to $125.04; and in the case of the cotton, silk, and rubber goods to $32.04; that said protest and the appeal required by law were duly made, and this action seasonably brought to recover said sums alleged to have been paid as excessive duty as aforesaid.

To further sustain the issues upon their part the plaintiffs called witnesses who testified substantially that the goods in question are used to insert in the upper part of shoes and gaiters; that the rubber is an essential part of the article, and that it could not be used for the purpose for which it is intended without rubber. That it is sometimes known as elastic webbings, and that it is also known under the name of elastic

19 goring. That there are webbings in which rubber is not a component part. That there are many kinds of webbings, such as

surgical webbings, suspender webbings and upholstery webbings. That all narrow woven fabrics are considered webbings. That the articles in question in this action were woven on the loom. That webbings are always woven on the loom.

In support of the issues upon his part the defendant called as a witness Gustave Binger, who, being duly sworn, testified in substance that he dealt in webbings and gorings; that plaintiff's Exhibits Nos. 7 and 8 (the elastic webbing in controversy) are bought and invoiced as elastic webbing, and are sold here as gorings, but are not invariably so called; but there are but few exceptions; they are also called elastic webbing by some; the general trade name for them is goring in this country, but they are never goring on the invoice, it always is elastic webbing. That is the proper name, because the goring may be something that has no elastic at all. Women, you know, in cutting their garments have gores in them, but they are not elastic gores. It is also true that webbing may not have elastic in it; all the other webbing handled here yesterday had no elastic threads in it.

J. W. Green, jr., being called as a witness for the defendant, testified, in substance, that he was a manufacturer in this country of elastic webbing or goring for shoes; that the articles in question are known in trade and commerce in this country as goring. That it was made on the loom; that it is never made on braiding machines or by hand. They are
20 always designated on the foreign invoice as elastic webbing, and "here in this country our customers always order gorings. I look upon the word elastic webbing as being the foreign name, and the word goring as the name in trade and commerce in this country." That he was acquainted with an article bought and sold in trade and commerce in this country under the name of galloon; that that article is always woven; that he was acquainted with an article bought and sold in trade and commerce in this country under the name of braid; that they are never woven but always braided. Being cross-examined, the witness testified, elastic webbing is a term known in trade and commerce in this country prior to 1883 applicable to goods like plaintiffs' importation, but it is a name very seldom used. There have always been two names for these goods, elastic webbing and elastic goring. Elastic webbing seems to be the foreign designation, and elastic goring the American designation. The term webbing, or elastic webbing, as applied to goods like these, has been known in trade and commerce among importers, because their invoices are all made that way. It was known to them as the foreign name because they were foreign goods. The term elastic webbing applied to goods like these has been known in trade and commerce since and prior to 1883 in and among importers and large dealers.

Being re-examined:

Q. Was it known to them as the American name or as the foreign name?

A. Of course, necessarily, the foreign name, because they were
21 foreign goods. I don't think that any American manufacturer ever sent a bill of goring calling it webbing, because it is not the American name.

By a juror:

Q. Why is it called goring?

A. Because it is used to make gores of; it forms the goring of a Congress shoe.

Q. That is the specific name for it?

A. Yes, sir; the shoe manufacturer calls them gores; he uses them in the sides of Congress gaiters. You go into his shoe shop and he will show you a bundle of gores; he has them up in bundles ready to stitch into the upper of a shoe, and he calls them gores.

And being further cross-examined, witness testified:

Union elastic webbing was originally known as elastic webbing made for ladies' shoes, with a silk face and cotton back; the word "union" came from the fact that it was part silk and part cotton; that was also known as goring. Wool elastic webbing is made of wool for the face, cotton for the back, and india rubber cords for the center. Cotton elastic webbing has cotton face and back and india rubber cords in the center; we always distribute them as goring to the shoe manufacturers. They are all fabrics of which India rubber is a part. There are other webbing nonelastic, such as gaiter webbing that you pull your shoe on with. I think if you used the word webbing the thing would occur to manufacturers first as a gaiter webbing to pull the shoe on with. This article here (plaintiffs' importation) was used at one time for making the whole top of shoes.

22 It was admitted in the trial that all the testimony hereinbefore set forth as to trade designation and use was likewise true immediately prior to and on March 3, 1883.

At the close of the case the defendantss' counsel moved the court for a direction of verdict for the defendant upon the general ground that the plaintiffs had not established their contention, and specifically as to the goods composed of worsted and rubber that it appeared from the testimony that they were known in this country under the specific name of goring, and that, especially since the word goring was inserted first into the worsted clause by the act of March 3, 1883, it more specifically described the goods in question than fabrics in part of India rubber.

This motion was denied by the court, to which ruling of the court the defendant's counsel duly excepted; which exception was duly allowed.

Defendant's counsel then asked to have submitted to the jury the question as to whether or not the merchandise composed of worsted and rubber was known in trade and commerce and among large dealers in this country under the name of goring, which motion was denied by the court, to which ruling defendant's counsel duly expected, which exception was duly allowed.

The court directed a verdict for the plaintiffs for the respective amounts sought to be recovered by the plaintiffs as aforesaid, to which ruling of the court the defendant's counsel duly excepted, which exception

23 was duly allowed.

And inasmuch as the exceptions, matters, and things aforesaid would not appear by the record, I have settled and allowed this bill of exceptions on the prayer of the said defendant by his counsel, and

It is ordered, That the same be filed as part of the record herein, with like force and effect as if the same had been redueed to writing, signed, and filed before the case was given to the jury.

Witness my hand this 5th day of October, 1888.

E. HENRY LACOMBE.

Consented to. C. C. P. P.

STANLEY, CLARKE & S.

Consented to.

STEPHEN A. WALKER,
U. S. Atty., Atty. for Deft. M. C.
CHARLES CURIE,
Atty. for Plff.

(Endorsed:) N. S. 9417. U. S. circuit court, southern district of New York. Bernard J. Salomon and others versus Wm. H. Robertson. Defendant's bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. U. S circuit court. Filed Oct. 5, 1888. John A. Shields, clerk.

24 Supreme Court of the United States.

WILLIAM H. ROBERTSON, PLAINTIFF IN ERROR,
vs.
BERNARD J. SALOMON & SAMUEL WENDEL PHILLIPS, defendants in error.

Assignment of errors.

Afterwards, to wit, on the fourth Monday of October in the same term, before the justices of the said court, at the Capitol in Washington, comes the said plaintiff in error, by Stephen A. Walker, (his) attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

STEPHEN A. WALKER,
Attorney for Plaintiff in Error.

25 (Indorsed:) 9417. United States Supreme Court. William H. Robertson, plaintiff in error, vs. Bernard J. Salomon & ano., defendant in error. Assignment of error. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within assignment of error is hereby admitted this 6th day of October, 1888. Charles Curie, attorney for defts. in error. To Charles Curie, attorney for defend't in error. U. S. circuit court. Filed Oct. 6, 1888. John A. Shields, clerk.

26 Supreme Court of the United States.

WILLIAM H. ROBERTSON,
v.
BERNARD J. SALOMON ET AL.

Joinder in error.

And afterwards, to wit, on the 4th Monday of October, in said term, the said defendants in error by Charles Curie, their attorney, come here into court and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And they prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

CHARLES CURIE,
Attorney for Defendants in Error.

27 (Indorsed) United States Supreme Court. William H. Robertson, plaintiff in error, vs. Bernard J. Salomon et al., defendants in error. Joinder in error. Charles Curie, attorney for defendants in error.

Due service of a copy of the within joinder in error is hereby admitted, this 11 day of Oct., 1888. Stephen A. Walker, attorney for plaintiff in error. To ——— ———, attorney for plaintiff in error. U. S. circuit court. Filed Oct. 11, 1888. John A. Shields, clerk.

28 UNITED STATES OF AMERICA, *ss:*

To Bernard J. Salomon, and Samuel Mendel Phillips, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the fourth Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the southern district of New York, wherein William H. Robertson is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated October 5th, 1888.

E. HENRY LACOMBE.

29 (Indorsed:) 9417 U. S. Supreme Court. William H. Robertson, plaintiff in error, against Bernard J. Salomon, & ano., defendants in error. Citation. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within citation is hereby admitted this 6 day of Oct., 1888. Charles Curie, attorney for defendants in error.

(Stamp:) U. S. circuit court, filed Oct. 6, 1888, John A. Shields, clerk.

(Indorsement on cover:) No. 272. William H. Robertson, late collector of the port of New York, plaintiff in error, vs. Bernard J. Salomon, and Samuel Mendel Phillips.

S. New York. C. C. U. S. Filed October 20, 1888.

JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

WILLIAM H. ROBERTSON, LATE collector, plaintiff in error,
vs.
BERNARD J. SALOMON AND ANOTHER.
} No. 272.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

A. X. PARKER,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

WILLIAM H. ROBERTSON, LATE collector, plaintiff in error,
vs.
BERNARD J. SALOMON AND ANOTHER.
} No. 272.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case is brought up from the circuit court of the United States for the southern district of New York by writ of error.

The suit was commenced in the superior court of the city of New York by Salomon & Phillips against the col-

lector of the port of New York in October, 1884, and was duly removed to said circuit court before the service of pleadings. (Rec., p. 3.)

The plaintiffs below, by their complaint and bill of particulars, demand judgment for $288.20 for alleged excessive duties exacted of, and paid by them, in May, 1883, and in March, April, and June, 1884, upon importations of upper-leather findings, and of fabrics in part India rubber, and the coverings, etc., thereof, imported from Liverpool and Hamburg in the years before named (p. 4).

Trial was had before Judge Lacombe and a jury in January, 1888; the jury found in favor of the defendant as to certain of the exhibits claimed upon, but, upon two other exhibits, found a verdict in favor of the plaintiffs below, under the direction of the court, in the sum of $157.08, and thereupon judgment was entered against the collector October 5, 1888, for $157.08 damages, $46.85 costs, $6.67 interest, amounting to $210.60 (p. 5).

The primary question presented by the case is as to the rate of duty which should be charged under the tariff act of 1883 upon certain goods invoiced as elastic webbings, but known to American tradesmen as gorings.

The secondary point is also presented, to wit, that the court erred in refusing to submit to the jury whether the worsted and rubber merchandise was not known in trade and commerce and among large dealers in this country under the name of goring.

Some of this merchandise was composed of worsted and India rubber, and the remainder of cotton, silk, and India rubber.

The goods in question are used to insert in the upper part of shoes and gaiters. The rubber is an essential part of the article.

The merchandise is always invoiced to the importer as "elastic webbings."

There are also several kinds of nonelastic webbings. All webbings are woven on a loom, and are never made by braiding machines or by hand. The goods are sold as "gorings."

The general trade name in the United States is gorings, although they are called elastic webbings by some.

Webbing is the foreign designation, goring is the American designation. "The term elastic webbing applied to goods like these has been known in trade and commerce since and prior to 1883 among importers."

The American manufacturer always bills this merchandise as goring, and the American customer purchasing in this country always orders gorings—not webbings.

The case assumes (fol. 22) that the word goring was first inserted in the worsted clause by the act of March 3, 1883; and it is admitted that all testimony set forth as to trade, designation, and use was applicable on and prior to said date.

THE ENACTMENTS.

The paragraphs of the act to be considered are as follows: 22 Stat., 506 (Schedule I, cotton goods):

> 1. *Cotton*, cords, braids, gimps, galloons, *webbing*, *goring*, suspenders, braces, and all manufactures of cotton, not specially enumerated or provided for in this act, and corsets of whatever material composed, *thirty-five per centum* ad valorem.

(Schedule K, woolens, *id.*, p. 509.)

2. *Webbings, gorings,* suspenders, braces, beltings, bindings, braids, galloons, fringes, gimps, cords, cords and tassels, dress trimmings, head nets, buttons or barrel buttons or buttons of other forms for tassels or ornaments wrought by hand or braided by machinery, *made of wool worsted,* the hair of the alpaca, goat, or other animals, *or of which wool, worsted,* the hair of the alpaca, goat, or other animals *is a component material, thirty cents per pound, and in addition thereto fifty per centum ad valorem.*

(Schedule N, sundries, *id.*, p. 514.)

3. *Webbing, composed of cotton,* flax, *or any other materials, not specially enumerated* or provided for in this act, *thirty-five* per centum ad valorem.

(Same schedule, p. 513.)

4. *India rubber fabrics, composed wholly or in part of India rubber, not specially enumerated or provided for in this act, thirty per centum ad valorem.*

5. Articles composed of India rubber, not specially enumerated or provided for in this act, twenty-five per centum ad valorem.

THE RATES.

The collector levied on the goods composed of worsted and rubber, at the rate of 30 cents per pound and 50 per cent ad valorem; and on those composed of cotton, silk, and rubber 35 per cent ad valorem (7).

The importers claimed:

That under existing laws, and particularly by Schedule N, of the tariff act of March 3, 1883, said goods were liable at no more than 30 per cent ad valorem, as fabrics in part India rubber not otherwise specially enumerated or provided for.

ASSIGNMENTS OF ERROR.

(1) The court erred in denying the motion made by the defendant below for the direction of a verdict in defendant's favor, on the ground that it appeared that the worsted and rubber goods were known in this country under the specific name of goring, as is set forth in the second paragraph of folio 22 of the record.

(2) The court erred in refusing to submit to the jury the question whether or not the merchandise composed of worsted and rubber was known in trade and commerce and among large dealers in this country under the name of goring, as is set forth in said folio.

(3) The court erred in directing a verdict for the said plaintiffs for the respective amounts sought to be recovered by them, as is set forth in the concluding paragraph of said folio.

POINTS.

I.

THE EXACTION OF THE DUTY COLLECTED WAS AUTHORIZED BY THE TARIFF ACT OF MARCH 3, 1883.

The contention of the plaintiffs below, as is shown in their protest (Fol. 18), and as appears in a general way from the evidence, and as is indicated in the request for instructions and the rulings thereon (Fol. 22), is that the worsted and rubber goods, and the cotton and rubber goods, and the silk and rubber goods should, under the act of March 3, 1883, be classified as "India-rubber fab-

rics, composed wholly or in part of India rubber, not specially enumerated or provided for in this act," dutiable at only 30 per cent under Sundries, Schedule N (22 Stat., 513).

It is manifest that the collector classified the worsted rubber goods as "webbings" or "gorings" of which worsted * * * is a component material," and exacted a duty of 30 cents per pound and 50 per cent ad valorem under the woolen schedule (*id.*, p. 509), and classified the cotton, silk, and rubber goods as "webbing composed of cotton or any other materials not especially enumerated or provided for in this act," and exacted a duty of 35 per cent under the sundries schedule. (*Id.*, 514.)

It is probable that the cotton and rubber goring might have been held dutiable at the same rate of 35 per cent under the clause of Schedule I hereinbefore cited.

The contention of the defendants in error must from the record be that the merchandise in question is to be classified and subjected to duty as India rubber fabrics and not otherwise.

The article imported was to be used as gores in the manufacture of the upper part of shoes and gaiters.

It is true that rubber is an essential part, but it is also apparent that without the worsted, cotton, or silk, there would be no webbing, goring, or fabric.

If the thing imported is commercially a goring, the importer's contention is shown to be unfounded.

It does not appear that there ever was any article that would answer to the word goring as used in the statute

unless included within the kind of merchandise imported by the defendants in error, or the Union elastic goring described in folio 21.

As these elastic webbings were known to the American trade almost entirely as goring, it may be fairly inferred that these were intended by Congress.

American manufacturers and their customers denominated the article goring. Congress, in adjusting duties so as to protect home industries while raising revenue, naturally adopted this word in placing an impost upon elastic webbing, composed of wool, cotton and silk fabrics, and rubber.

As the word goring does not appear in the webbing clause until the act of 1883, some special purpose must account for its use.

That purpose is found in the making of goring subject to the 30 cents per pound and 50 per cent ad valorem duty.

Defendant's witnesses below state upon the trial that the article is sometimes known as elastic webbing, and is also known under the name of elastic goring (p. 7, foot).

It can not be said that gorings may mean something besides the article in controversy; it does not appear that any other gores than those for shoes are imported; the gores of women's garments are spoken of, but they are cut, not imported.

A witness says (fol. 21) that the article forms the goring of a congress shoe; that the shoe manufacturer calls them gores and uses them in the sides of congress gaiters; that he has them in bundles ready to stitch into the upper of the shoe.

The same witness says that wool elastic webbing is made of wool for the face, cotton for the back, and India rubber cords for the center; that cotton elastic webbing has a cotton face and back and India rubber cords in the center.

The witness also says that Union elastic webbing was originally known as elastic webbing made for ladies' shoes, with a silk face and cotton back, and that this was also known as goring.

It seems to be clear that all of these goods were elastic webbings, taking from their use the name of gores.

The article in controversy does not fall under the India rubber fabric clause unless it is "not especially enumerated or provided for in this act otherwise;" but upon page 514, following this clause, we have, "webbing, composed of cotton, flax, or any other materials not specially enumerated or provided for," charged 35 per cent; while on page 509, "webbings, gorings * * * made of worsted * * * or of which worsted is a component material," are charged with a duty of 30 cents per pound and 50 per cent ad valorem. And on page 506 cotton goring is charged 35 per cent.

With this explicit language in view, can it be successfully asserted that worsted webbings and gorings which are made elastic by the interweaving of threads of rubber and by a peculiar method of construction are unenumerated and unprovided for in this act, and that, therefore, these webbings and gorings must be placed under the name of India rubber fabrics?

It is respectfully submitted that such an adjustment would be manifestly unreasonable and unjust.

It is admitted that rubber forms a part of all these webbings and gores, and also that there are webbings (but not gores) known to commerce that are not elastic, but it is insisted that the principal material, that which gives the thing its form, substance, and character, is the manufactured fiber, which, when woven as it is here—although rendered elastic by the method of construction and by the use of threads of rubber—falls under the classification of goring.

The history of the enactments relating to the merchandise involved in this investigation, coming down to the year 1883, and of the decisions of this court upon those antecedent enactments appears in the two following cases:

1. In *Arthur* v. *Davies* (96 U. S., 135), decided in 1877, Mr. Justice Hunt, delivering the opinion of the court, said:

> The twenty-second section of the act of March 2, 1861 (12 Stat., 191), imposed a duty of 30 per cent on "braces, suspenders, webbing, or other fabrics composed wholly or in part of India rubber, not otherwise provided for."
>
> The eighth section of the act of July 14, 1862 (*id.*, 552), imposes the following duty: "On manufactures of India rubber and silk, or of India rubber and silk and other materials, 50 per cent ad valorem."
>
> The thirteenth section imposes, "in addition to the duties heretofore imposed by law on braces, suspenders, webbing, or other fabrics, composed wholly or in part of India rubber, not otherwise provided for, 5 per cent ad valorem." (*Id.*, 555, 556.)
>
> In schedule C of the act of July 30, 1846 (9 *id.*, 44), the same provision is made, in these words: "Thirty per cent ad valorem on braces, suspenders,

webbing, or other fabrics, composed wholly or in part of India rubber, not otherwise provided for."

The same designation and the same duty are found in the seventh subdivision of section 5 of the act of August 30, 1842, where they do not exceed $2 per dozen in value. (5 *id.*, 555.)

It thus appears that for thirty years prior to this importation, and in four different statutes, braces, and suspenders, composed wholly or in part of India rubber, had been a subject of duty *eo nomine;* and in the same statute—where a duty of 50 per cent is imposed on other manufactures of which rubber is a component material, which it is now sought to apply to braces and suspenders—braces and suspenders containing that material are, by name, charged with an additional duty of 5 per cent.

It is not material that in one kind of suspenders cotton was the component of chief value, and that each contained some proportion of silk. If they are technically and commercially braces and suspenders composed in part of India rubber, they take their dutiable character from that source, and not from the fact that they would otherwise fall under the general designation applicable to other subjects.

Under the principles of the cases already decided it is clear that excessive duties were exacted, and that the rulings of the judge on the trial were correct.

2. In *Beard* v. *Nichols* (120 U. S., 260), (reported below, 7 Fed. Rep., 579), decided in 1887 upon an importation made before 1883, Mr. Chief Justice Waite, delivering the opinion of the court, said:

> The single question in this case is as to the duty payable in the latter part of 1878 and the early part of 1879 on "webbing made of India rubber, wool, and cotton," and known as "wool elastic webbing,"

as distinguished from "union elastic webbing," made of rubber, silk, and cotton, and "cotton elastic webbing," made of rubber and cotton. It is used for gores and gussets in the manufacture of Congress boots, and, without the rubber, would not be adapted to that use. In its manufacture it is not wrought by hand or braided by machinery, but is woven in a loom.

In the court below, three clauses of section 2504 of the Revised Statutes were brought under consideration, to wit:

First. Schedule L, "Wool and woolen goods" (Rev. Stat., p. 472); "Webbings, beltings, bindings, braids, galloons, fringes, gimps, cords, cords and tassels, dress trimmings, head-nets, buttons or barrel buttons, or buttons of other forms for tassels or ornaments, wrought by hand or braided by machinery, made of wool, worsted, or mohair, or of which wool, worsted, or mohair is a component material, fifty cents per pound, and, in addition thereto, fifty per centum ad valorem."

Second. Schedule M, "Sundries" (Rev. Stat., p. 477); "India rubber, articles composed of, braces, suspenders, webbing, or other fabrics, composed wholly or in part of India rubber, not otherwise provided for, thirty-five per centum ad valorem."

Third. Schedule L, "Wool and woolen goods" (Rev. Stat., p. 471); "Woolen cloths, woolen shawls, and all manufactures of wool of every description made wholly or in part of wool not herein otherwise provided for, fifty cents per pound, and, in addition thereto, thirty-five per centum ad valorem."

In this court, however, it was conceded by the Solicitor-General, in his argument for the collector, that, as the third clause does not specifically provide for webbing and both the others do, that clause would

not be relied on here. The precise question to be determined is, therefore, whether these goods are dutiable as "webbing * * * composed wholly or in part of India rubber," at thirty-five per cent ad valorem, or as "webbing * * * made of wool * * * or of which wool * * * is a component material," at fifty cents per pound, and, in addition thereto, fifty per cent ad valorem. The collector exacted the larger duty, and this suit was brought to recover back the difference between that and the smaller one. The court below gave judgment against the collector, and, to reverse that judgment, this writ of error was sued out.

In the tariff act of August 30, 1842 (chapter 270, section 5, subdivisions 10, 5 Stat., 555), was this provision: "On India rubber, oilcloth, webbing, shoes, braces, or suspenders, or other fabrics or manufactured articles composed wholly or in part of India rubber, thirty per centum ad valorem." In the act of July 30, 1846 (chapter 74, section 11, Schedule C, 9 Stat., 44), this was the language: "Braces, suspenders, webbing, or other fabrics composed wholly or in part of India rubber, not otherwise provided for." The same provision was made in the act of March 2, 1861 (chapter 68, section 22, 12 Stat., 191), and in the act of July 14, 1862 (chapter 163, section 13, 12 Stat., 556), which increased the duties on these articles five per centum ad valorem. In the last of these acts (section 8, p. 552) was the following provision: "On manufactures of India rubber and silk, or of India rubber and silk and other materials, fifty per centum ad valorem." These provisions of the acts of 1861 and 1862 were reënacted in substantially the same language as part of the Revised Statutes. That in relation to manufactures of India rubber and silk, and India rubber and silk

and other materials, is found in section 2504, immediately preceding the second of the clauses above referred to.

In 1873, while the acts of 1861 and 1862 were in force, and before the enactment of the Revised Statutes, Davies & Co. imported into New York "suspenders or braces manufactured of rubber, cotton, and silk," and the collector exacted a duty of fifty per centum ad valorem as upon a manufacture of India rubber and silk and other materials; but this court held in *Arthur* v. *Davies* (96 U. S., 135) that they were only dutiable at the rate of thirty-five per centum ad valorem, as suspenders or braces composed wholly or in part of India rubber, and that they were not "otherwise provided for" as manufactures of India rubber and silk and other materials, because for thirty years before the importation in that case, and in four different statutes, braces and suspenders composed wholly or in part of India rubber had been a subject of duty *eo nomine*. During the same year Faxon, Elms & Co. imported into Boston from Liverpool webbing which was a manufacture of India rubber, silk, and cotton, known as "union gusset," "Union web," or "union elastic web," and used in the manufacture of the gores or gussets of congress boots. In this case, also, the collector exacted a duty of fifty per centum ad valorem, under section 8 of the act of 1862, as on manufactures of India rubber and silk and other materials, but this court held at its October term, 1878, in *Faxon* v. *Russell*, not reported, on the authority of *Arthur* v. *Davies*, that the goods were only dutiable as webbing composed wholly or in part of India rubber.

These cases, with which we are entirely satisfied, are conclusive upon the questions here involved. Ever since 1842 "webbing" composed wholly or in part of India rubber has been a subject of duty *eo nomine*,

and it is no more otherwise provided for as webbing composed wholly or in part of wool than it would be as a manufacture of India rubber and silk, or of India rubber and silk and other materials, if silk had been one of its component parts.

These cases show the state of the law as it existed previous to the enactment of the tariff of 1883.

At the time of that enactment there was an extensive use of elastic webbing in shoe-making in this country, and there were home manufacturers of the article as well as large importations of the same, and the goods were almost universally known in the United States as "*gorings*."

Under this state of trade and consumption, and necessarily with knowledge of this familiar term of designation, Congress inserted the word goring into the cotton schedule, charging upon cotton goring 35 per cent, and also inserted the word into the woolen schedule, charging upon worsted goring 30 cents per pound and 50 per cent ad valorem.

It is respectfully submitted that by this action Congress specially enumerated and specially provided for cotton goring and for worsted goring, and that, therefore, the paragraph admitting fabrics composed in whole or in part of India rubber at 30 per cent had no application to these gorings.

II.

THE COURT ERRED IN DIRECTING A VERDICT AGAINST THE GOVERNMENT AND IN REFUSING TO SUBMIT THE QUESTION INVOLVED TO THE JURY.

This case was tried before Judge Lacombe and a jury in January, 1888.

In December of the same year the suit of *Drucker* v. *Robertson* (38 Fed. Rep., 97) was tried before the same judge and a jury.

The action was to recover back custom duties. The case related to some other goods, and also to three kinds of gorings imported under the act of March 3, 1883: (1) silk, cotton, and rubber; (2) worsted, cotton, and rubber; (3) cotton and rubber. The collector exacted 35 per cent under schedule N on the first, 30 cents per pound and 50 per cent ad valorem under schedule K on the second, and 35 per cent under schedule I on the third. The plaintiff claimed that all were dutiable at 30 per cent as India rubber fabrics under schedule N.

Mr. Stephen G. Clarke, who assisted the importers in trying the case at bar, appeared for the plaintiff in the Drucker case.

The court held plaintiff entitled to recover as to the first (silk, cotton, and rubber), elastics, and proceeded to charge the jury as to the second and third specified gorings, and such charge and the conclusion of the case as reported, are as follows:

> That leaves only two of these varieties of elastic fabric for your consideration. The plaintiff contends that they are dutiable under the 453d paragraph of the act of 1883, which provides for a duty on India-rubber fabrics, composed wholly or in part of India-rubber. Undoubtedly these are India-rubber fabrics, composed in part of India rubber, and as such would be dutiable under that paragraph, unless by some special enumeration they are otherwise provided for in the tariff act. The defendant, the Government, contends that they are elsewhere specially

enumerated, and defendant's counsel refers to the word "gorings," which is twice used elsewhere in the tariff act; once in the wool schedule, and again in the cotton schedule, as referring to these goods. Now, without construing the language of those paragraphs where the word "goring" is used, I shall probably put the question to you most simply and in the way you can best dispose of it by stating it thus: In order to sustain his contention that the use of the word "gorings" in the cotton and in the wool schedules operates to take these particular articles out of their classification as India-rubber fabric, the defendant must satisfy you, by a fair preponderance of proof, that at the time when Congress, in this act of 1883, first used the word "gorings" in a tariff act, that word had in the trade and commerce of this country a well-known trade meaning; and further, that that well-known trade meaning was such that it would cover goods like these, and, moreover, was such that it would not, and did not, cover gorings which were nonelastic. Unless he satisfies you on the affirmative of those various propositions, he has not made out such a case as will entitle him to claim that these articles are to be found in the wool and cotton schedules. To recapitulate: He must satisfy you that in the trade and commerce of this country on March 3, 1883, the word "goring" had a well-defined meaning, and that that well-defined meaning covered only elastic fabrics such as these; because, if it also covered nonelastic fabrics, then the provision for "gorings" in the wool and cotton schedules is met by the production of articles other than these, and it is not necessary to draw out any articles from the elastic schedule to be covered by that word. The language of trade and commerce, you will understand, of course, is not the mere shop-

> purchasing language of the consumer who buys over a retail counter, but it is the language in use by the large dealers of the country, who conduct the trade of the country, so called.
>
> The jury rendered a verdict for the defendant on the question left to them.

This charge applies, almost in terms, to the facts presented by the record in the case at bar.

The argument in favor of the submission is so clearly shown and illustrated in Drucker's case that no further elaboration could be useful.

The questions of fact relating to worsted, cotton, and rubber goring, and to cotton and rubber goring, were identical in both suits.

These questions, in both cases, were questions for the jury.

A. X. PARKER,
Assistant Attorney-General.

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JAMES H. McKENNEY.
CLERK.

C G Burgoyne's Printing Business, [illegible]

Supreme Court of the United States,

OCTOBER TERM, 1891.

WILLIAM H. ROBERTSON vs. BERNARD J. SALOMON ET AL.	No. 272.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

In the spring of 1884, certain goods invoiced as "elastic webbings," some of them composed of worsted and india-rubber, and the rest of cotton, silk and india-rubber, were imported by the defendants in error from England into New York. They are used to insert in the upper part of shoes and gaiters, *the rubber being so essential a part of the article that without it the goods would not be adapted for their intended use.* Sometimes they are known as elastic webbings, and also as elastic-goring. There are many kinds of webbings; *ex. gr.*, surgical webbings, suspender webbings and upholstery webbings; indeed, all narrow woven fabrics are considered webbings. All webbings are woven. The goods in question were woven on a loom.

There are webbings of which rubber is not a component; (Rec. 7, and top of p. 8) that is, non-elastic.

Such was substantially the testimony of the plaintiffs below.

The defendant below (who is sued as Collector of the Port) called two witnesses, who did not materially vary the case as made by the original plaintiffs. They said this article was always bought and invoiced as elastic-webbing, but more generally known in this country as gorings, "but are not invariably so called; they are also called elastic-webbing by some. * * * *That is the proper name, because the goring may be something which has no elastic at all.* * * * It is also true *webbing may not have elastic* in it." (*Id.* p. 8.) They are never made by hand, nor on braiding machines. The second witness called by the Government was a domestic manufacturer "of elastic-webbing, or goring, for shoes." *(Ib.)* Upon cross-examination, he testified: "Elastic-webbing is a term known in trade and commerce in this country, prior to 1883, applicable to goods like plaintiff's importations, but it is a name very little used. There have always been two names for these goods, elastic-webbing and *elastic*-goring." *(Ib.)* 'Union'-elastic-webbing, originally known as 'elastic-webbing for ladies' shoes,' he said was called 'union' because partly silk and partly cotton. That was also known as goring. Wool-elastic-webbing has wool for the face, cotton for the back, and india-rubber cords in the centre; cotton-elastic-webbing has cotton face and back, and india-rubber cords in the centre; we always distribute them as gorings to the shoe manufacturers. (Rec. p. 9.)

They are all fabrics of which india-rubber is a part." *(Id.)* There are other webbings, non-elastic, etc. *(Ib.)*

All the testimony, on this subject of designation, is applicable to the third of March, 1883, and prior thereto. *(Ib.)*

As such collector, the defendant [illegible] in error assessd the goods in question composed of *worsted* and rubber

under this clause of Schedule K, Act of March 3, 1883 ;—(Rec. 7).

"Webbings, gorings, suspenders, braces, beltings, bindings, braids, galloons, fringes, gimps, cords, cords and tassels, dress-trimmings, head nets, buttons, or barrel-buttons, or buttons of other forms for tassels or ornaments, wrought by hand or braided by machinery, made of wool, worsted, the hair of the alpaca, goat or other animals, or of which wool, worsted, the hair of the alpaca, goat or other animals, is a component material, thirty cents per pound, and, in addition thereto, fifty per centum *ad valorem*." (22 Stats. 509).

To our goods composed of *silk*, cotton and india-rubber, he applied the following clause of Schedule I of the same act ;—(Rec. 7.)

"Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton not specially enumerated *or provided for* in this act, and corsets, of whatever material composed, thirty-five per centum *ad valorem*." (22 Stats. 506.)

Against these exactions the importers seasonably and properly protested (and brought suit) claiming (Rec. 7.) for their goods the rate of duty prescribed, in Schedule N, of the same act, for

"India-rubber fabrics, composed wholly or *in part* of india-rubber, not specially enumerated or provided for in this act, thirty per centum *ad valorem*." (22 Stats., 513 near top).

There was a verdict directed for the plaintiffs, for their whole claim, and the collector brings the cause here, assigning that direction for error. (Rec. 9 bottom, and 10.)

POINTS.

We shall have to await the Attorney-General's brief (not yet on hand) to learn how he discriminates this case from the one already determined by this Court; for we cannot perceive any difference.

Nichols vs. Beard, 7 F. R. 579.
Beard vs. Nichols, 120 U. S. 260.

In the meantime, we shall argue the cause upon the merits, as if of first impression.

I.

Each party moved for a directed verdict (Rec. 9, fol. 22) which is a concession that the question was one of *law, upon the facts proved.*

Provost vs. McEnroe, 102 N. Y. 650.
Colligan vs. Scott, 58 *Id.* 571.

The motion to have a special verdict found as to one fact *(Ib.)*, instead of requesting a submission of the whole case, was addressed to the discretion of the trial Court; hence, the denial of such motion cannot be assigned for error here.

R. R. vs. Horst, 93 U. S. 299, § 5.

II.

The first appearance of the clause under which we claim is in the Act of 1842 :—

On india-rubber oil-cloth, *webbing*, shoes, braces or suspenders, or other *fabrics* or *manufactured articles* composed wholly or in *part* of india-rubber, 30 % *ad valorem ;* provided that braces or suspenders of *that* material, not exceeding two dollars per dozen shall be

valued at two dollars a dozen, and pay duty accordingly. (5 Stats. 555.)

Act of 1846. (9 Stats. 44, near bottom.)

Schedule H of that act (*Id.* 48) put a duty of five per cent. upon "lastings for shoes," etc. The Act of 1857 added the qualification, "not combined with india-rubber." (11 Stats. 193.)

"Braces, suspenders, webbing or other fabrics, composed wholly or in *part* of india-rubber, not otherwise provided for" are dutied 30%, by Act of 1861. (12 Stats. 191.)

The Act of 1862 put an additional ten per cent upon all shoe-lastings, &c., "not combined with india-rubber" (*Id.* 550 top) and fifty per centum "on manufactures of india-rubber and silk, or of india-rubber and silk and other materials." (*Id.* 552 near top.)

This act put a five-per cent. addition upon "webbing, composed of wool, cotton, flax or any other materials not otherwise provided for." (*Id.* 557 bottom.)

Arthur vs. Davies, 96 U. S. 136.

In the revision, Schedule M, "Sundries" the law then in force thus duties imports of this material;—

India-rubber and silk, manufactures of, and manufactures of india-rubber and silk and other materials, fifty per centum *ad valorem*.

India-rubber, articles composed of.—Braces, suspenders, *webbing*, or *other fabrics*, composed *wholly or in part* of india-rubber, not otherwise provided for, thirty-five per centum *ad valorem*.

Articles composed *wholly* of india-rubber, not otherwise provided for, twenty-five per centum *ad valorem*.

India-rubber boots and shoes, thirty per centum *ad valorem*. (Rev. Sts., 2d Ed., p. 477.)

The revision mentions two other classes of webbings, neither of which has ever been here claimed to be applicable to such goods as were imported by plaintiffs.

Nichols vs. Beard, 7 F. R. 580–1.

Beard vs. Nichols, 120 U. S. 262.

It was claimed before this Court, in this last-cited case, that the goods were dutiable under the reproduction of the Act of 1867 (14 Stats. 561) "on webbings, beltings," etc., "wrought by hand or braided" etc. "made of wool, worsted," etc. *(Ib.)*

The decision was that the india-rubber provision was the applicable one, the question being the same as determined in Arthur vs. Davies (96 U. S. 135) and Faxton vs. Russell—which last related to gores for Congress boots. *(Ib.)*

Indeed, substitute "webbings" for "braces and suspenders," in the opinion, 96 U. S. 136, and (as bearing upon our goods) the language is, "*mutato nomine, de te narratur.*"

"It thus appears that for thirty years prior to this importation, and in several different statutes, *webbings* composed wholly or in part of india-rubber had been a subject of duty, *eo nomine*," etc., etc. (96 U. S. 136 lower half.)

The *only* question, apparently, which was sought to be raised below was, whether the interpolation of "gorings" in the Act of 1883 (22 Stats. 509 and *ante*, p. 3 top) deprived our goods of the advantage, enjoyed theretofore for forty years, of coming in under a clause based upon the elastic material in their composition, to which was entirely due all their value for the purpose for which they were imported.

Evidently, the *principle* of the Sussfield case (96 U. S. 128) applies here; since the elasticity imparted to our fabric is as much its essential quality as is the optical effect of glass in spectacles.

The two clauses, taken together intend that "webbings, gorings," etc., composed of wool, worsted, etc., shall pay a pound duty and fifty per centum *ad valorem; unless* they were also a fabric composed in whole or in part of india-rubber; in which case that element

should control, and the duty be but thirty per cent. *ad valorem*.

Salomon vs. Arthur, 102 U. S. 212–3.
Meyer vs. Hartranft, 28 Fed. Rep. 358.
Hartranft vs. Meyer, 135 U. S. 238–9.

III.

The request to go to the jury upon "the question as to whether or not the merchandise composed of worsted or rubber was known in trade and commerce, etc., under the name of *goring*" (Rec. 9, folio 22) indicates a theory that "gorings" is a specific denomination, under which our goods come.

But (as noted) such *special* submission could not be demanded of right; and, upon the concession of mutual requests for a directed verdict, the Judge might well find that the vast preponderance (if not substantially and in effect the *whole*) of the evidence showed that it was *not* known merely as "goring."

Every witness stated our goods to be commercially known by a name expressive of their quality of elasticity.

Our numerous witnesses testified "that the rubber is an essential part of the article" without which it would be unsuited for its intended purpose; "that it is sometimes known as 'ELASTIC webbing' and that it is also known under the name of 'ELASTIC goring'; that there are *webbings* in which rubber is not a component," etc., etc. (Rec. 7 bottom).

Though Gustav Binger, first witness for the defense, testified that our goods, *always* "bought and invoiced as *elastic* webbings," were sold here as 'goring,' it was also called here by some "elastic webbing—which *is the proper name*, because goring may be something *that has no elastic* at all (Rec. 8 top). He concludes:

"It is also true that webbing may not have elastic in it; all the other webbing handled here yesterday had no elastic threads in it. *(Ib.)*

Mr. Green, next witness, a domestic manufacturer, after expressing his view (or manner of 'looking upon it') that 'elastic webbing' was the foreign and 'goring' the domestic name, distinctly stated, upon cross-examination that "elastic webbing is a term known in trade and commerce in this country" in 1883, etc. (Rec. 8, fol. 20.) He immediately added;

"*There have always been two names for these goods,* ELASTIC *webbing and* ELASTIC *goring.*

Elastic webbing seems to be the foreign designation and *elastic* goring the American designation." (Rec. 8, fol. 20.)

Upon further cross-examination, he described 'wool *elastic* webbing' and 'cotton *elastic* webbing'—both being "fabrics of which india-rubber is a part"—and concluded:

"There are other webbing non-elastic, such as gaiter webbing that you pull your shoe on with.

"I think if you used the word 'webbing' the thing would occur to manufacturers first as a gaiter webbing, to pull the shoes on with." (Rec. 9, fol. 21.)

This shows that, whether known as 'webbing' or 'goring'—which was the distinction upon which defendant's witnesses dwelt—*non*-elastic webbings *only* were commercially known by the single word webbings, and goods like ours, in both countries, as "elastic"—in England, as "elastic webbing" and here by that term, and also as "elastic goring." The very quality which determines its use, and limits its usefulness, and affixes the duty, is recognized in trade nomenclature.

It is only the poverty of language that employs a compound term to designate an article possessing a quality *sui generis*, and which differentiates it peculiarly from all things not having this quality. "This

use of the name has probably been one cause of the confusion which has arisen upon the subject."

Meyer vs. Arthur, 91 U. S. 577.

The opinion in 96 U. S. 110, bottom, endorses the views of WOODRUFF, C. J., in a case in which he charged that;

"*Specific names*, when used in tariff acts are to be construed according to their general use in trade and commerce. And proof as to the commercial designation of an article named in a tariff must go to show that the name of the goods in question is *identical* with the specific term used in the statute. For instance, proof that a silk lace is known in trade as '*black* thread lace' does *not* take it out of the duty laid upon it in 1864, as silk lace, and subject it to duty under a prior act designating 'thread lace.'

Jaffray vs. Murphy, 19 Int. R. Rec. 143.

The principle thus enunciated, applies much more strongly to the present case; because *color* is a mere *incident* (and generally, merely a matter of taste) while *elasticity* is a *quality* determining and limiting the adaptability of the fabric which possesses or lacks it.

Even if ordinary webbing and goring is dutiable as claimed by the Government, "*elastic* webbing" or "elastic goring," so known in trade because of this characteristic, is dutiable as we claim and as the Court below adjudged.

IV.

THESE GOODS WERE NOT "WROUGHT BY HAND NOR BRAIDED BY MACHINERY" (Rec., 8, fol. 19).

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